the arbitration hearing, subpoenas, protective orders, and resolution of discovery disputes. (4/10/03 DRP at 8-9). Damages are not circumscribed: "[t]he Arbitrator . . . may grant any remedy or relief that would have been available to an individual Employee had the claim been asserted in court . . . ." (4/10/03 DRP at 9). Except for a $100 filing fee for arbitration and the employee's fees for his own experts and attorneys, Gulfstream pays for the costs of arbitration, including the arbitrator's fee and reasonable travel expenses, the cost of renting a hearing room, and the employee's salary, if still employed, for time spent at the arbitration (for up to seven days). Even then, an arbitrator may award experts' and attorneys' fees to the employee. (4/10/03 DRP at 10). The DRP requires the arbitrator to issue a written opinion (4/10/03 DRP at 9), and retaliation against employees who initiate proceedings under the DRP is strictly prohibited. (4/10/03 DRP at 3).

C. Proceedings Below

Petitioners are employees and former employees of Gulfstream who had employment-related grievances and were subject to the arbitration provisions of the DRP. All petitioners were employed both when Gulfstream distributed notice of the DRP and on its effective date, and none denies receiving notice of the DRP and its terms. *See* Pet. App. 3a n.1 (noting that "[t]he district court found that each of the plaintiffs had sufficient notice of the DRP" and observing that plaintiffs "do not challenge the district court's conclusion that each of the plaintiffs had sufficient notice of the DRP").[3]

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[3] Some petitioners questioned whether they received either the August 2002 or the April 2003 DRP, but none denied receiving at least one DRP.

Rather than arbitrating their grievances, however, petitioners filed suit alleging claims under the Age Discrimination in Employment Act ("ADEA"), the Fair Labor Standards Act ("FLSA"), the Employee Retirement Income Security Act ("ERISA"), and Title VII. After petitioners refused repeated demands to arbitrate, respondents filed motions to compel arbitration and to dismiss the actions, which petitioners opposed.

Recognizing that the "sole contested issue before [it] is whether the DRP constitutes a valid, written agreement to arbitrate between the parties," Pet. App. 42a, the district court found that the DRP constituted such a binding contract because it met all of the relevant requirements under Georgia law, *id.* at 44a-49a, and was not unconscionable under state law, *id.* at 50a-51a.

The district court also rejected petitioners' claim that a separate federal law requirement of a "knowing and voluntary" waiver of petitioners' procedural rights to a jury trial applied to the agreement to arbitrate. The court held that imposing such a standard "flies in the face of both the explicit wording of the FAA . . . and United States Supreme Court precedent," Pet. App. 43a n.6, and is not required by any of the "underlying substantive federal statutes such as Title VII and the ADEA," *id.* at 51a. The district court thus granted respondents' motions to compel arbitration. *Id.* at 51a-54a.

The Eleventh Circuit unanimously affirmed, holding that the DRP constituted a valid and enforceable agreement to arbitrate under the FAA. The Eleventh Circuit agreed with the district court that the DRP was a binding and enforceable contract between petitioners and Gulfstream "under ordinary Georgia contract law." Pet. App. 21a; *see also id.* at 22a-33a (applying Georgia law).

The Eleventh Circuit, like the district court, also rejected plaintiffs' arguments and held that "the DRP's agreement to arbitrate and waiver of jury trial rights are governed by contract principles and are not subject to the heightened knowing and voluntary standard argued by plaintiffs." Pet. App. 17a. Citing both the FAA and precedent from this Court, the court of appeals noted that arbitration agreements governed by the FAA are "'valid, irrevocable, and enforceable,'" unless generally applicable principles of contract law permit revocation. Pet. App. 17a (quoting 9 U.S.C. § 2). The court of appeals rejected the notion that plaintiffs' pursuit of federal statutory claims requires a different result, because, "as the Supreme Court has recognized, a party agreeing to arbitration does not waive any substantive statutory rights; rather, the party simply agrees to submit those rights to an arbitral forum." *Id.* at 17a-18a.

Nor did plaintiffs' efforts to cloak their arguments in constitutional garb change the analysis, because the Seventh Amendment "does not confer the right to a trial, but only the right to have a jury hear the case *once it is determined that the litigation should proceed before a court*," and, therefore, the "jury trial right vanishes" when the arbitral forum is properly invoked. Pet. App. 18a (internal quotation marks omitted; emphasis in original). Moreover, any such heightened standard would be entirely at odds with "the FAA's plain language," which makes "clear that arbitration agreements are enforceable except for state-law grounds for ordinary revocation." *Id.* at 19a.

The Eleventh Circuit recognized, moreover, that plaintiffs' arguments concerning a heightened standard were largely beside the point, because "plaintiffs' acceptance of the DRP probably would satisfy even a heightened 'knowing and voluntary' standard in any event." Pet. App. 20a n.13.

REASONS FOR DENYING THE WRIT

The FAA provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA "manifest[s] a 'liberal federal policy favoring arbitration agreements,'" *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), and requires federal courts to "'rigorously enforce'" such agreements. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). To implement this federal policy, the Court has instructed that "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209 (2006) ("§ 2 [contains] the FAA's substantive command that arbitration agreements be treated like all other contracts.").

Consistent with the text of the FAA and this Court's decisions interpreting it, the Eleventh Circuit applied ordinary principles of Georgia contract law to determine the enforceability of the arbitration provisions contained in Gulfstream's DRP, and it expressly rejected petitioners' argument that federal law requires that employers meet an additional "knowing and voluntary" waiver standard before a federal court can enforce an agreement that requires employees to arbitrate, rather than litigate, their federal statutory claims.

Petitioners do not contest that their substantive federal statutory claims may be the subject of an agreement to arbitrate, enforceable pursuant to the FAA. *See, e.g., Circuit City*, 532 U.S. at 111; *Gilmer*, 500 U.S. at 26; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985). Nor do they contend that the text of any particular substantive statute (such as Title VII or the ADEA) manifests a congressional intent to create a more demanding standard for reviewing the enforceability of an arbitration agreement governing such claims. Instead, they contend that there is a split among the courts of appeals regarding the existence of a heightened federal waiver standard that may preclude enforcement of an agreement to arbitrate employment claims even where (as here) the agreement is enforceable as a matter of state law. As will be shown, petitioners' contentions reflect gross exaggerations.

A. No Ripe Conflict Exists.

1. Most Circuits Have Correctly Rejected A Federal "Knowing and Voluntary" Waiver Standard.

The large majority of Circuits to have considered the question – like the Eleventh Circuit below – have squarely rejected the "knowing and voluntary" waiver standard petitioners advance, and instead apply ordinary principles of state contract law to arbitration agreements governing employment-related claims. *See, e.g., Seus v. John Nuveen & Co.*, 146 F.3d 175, 184 (3d Cir. 1998) ("Nothing short of a showing of fraud, duress, mistake or some other ground recognized by the law applicable to contracts generally would have excused the district court from enforcing [plaintiff's] agreement [to arbitrate]."); *Sydnor v. Conseco Financial Servicing Corp.*, 252 F.3d 302, 305-07 (4th Cir. 2001) (applying "elementary principle[s] of contract law" and rejecting plaintiff's suggestion that a "more demanding

standard" is appropriate in determining the enforceability of the arbitration agreement); *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002) (outside the context of a collective bargaining agreement, no heightened standard applies to the enforceability of an agreement to arbitrate); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366-67 (7th Cir. 1999) ("An agreement to arbitrate is treated like any other contract: 'In determining whether a valid agreement arose between the parties, a federal court should look to the state law that ordinarily governs the formation of contracts.'"); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004) ("Whether an arbitration agreement is valid is a matter of state contract law."); *see also* Pet. App. 20a-21a & n.14 (citing cases).

This position is plainly correct. Imposition of a heightened federal "knowing and voluntary" standard to supplement whatever level of knowledge and voluntariness is required by state contract law is irreconcilable with the FAA and this Court's decisions interpreting it. *See, e.g., Seus*, 146 F.3d at 183-84 (holding that applying a heightened knowing-and-voluntary standard to arbitration agreements would be inconsistent with the FAA and *Gilmer*); *American Heritage Life Ins.*, 294 F.3d at 711; *Sydnor*, 252 F.3d at 307; *cf. Williams v. Imhoff*, 203 F.3d 758, 764 (10th Cir. 2000) (rejecting application of "clear and unmistakable" waiver standard).

The FAA was enacted precisely for the purpose of "plac[ing] arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S. at 24. As the text of the FAA makes manifest, an agreement to arbitrate in lieu of litigation is "valid [and] irrevocable . . . save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Buckeye Check Cashing*, 126 S. Ct. at 1209. "Of course, courts should remain attuned

to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Mitsubishi*, 473 U.S. at 627 (citation omitted). Absent such generally applicable contract law claims, however, the FAA "'provides no basis for disfavoring agreements to arbitrate statutory claims.'" *McMahon*, 482 U.S. at 226 (quoting *Mitsubishi*, 473 U.S. at 627).

And, as this Court has repeatedly emphasized, the fact that arbitration agreements foreclose access to a judicial forum does not warrant application of a heightened standard. This Court stated in *Gilmer*, for example, that "[s]uch generalized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" *Gilmer*, 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989); second alteration in original). In carving out a heightened standard for requirements to arbitrate *contained in collective bargaining agreements* not governed by the FAA, moreover, *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), made clear that *Gilmer* had proscribed such a heightened standard in the context of an individual waiving his own statutory rights to a judicial forum. *See id.* at 80-81; *see also id.* at 78 n.1 (declining to consider applicability of FAA to the collective bargaining agreement before it).[4]

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[4] *Wright* explained that a "clear and unmistakable" standard was applicable to requirements to arbitrate contained in a collective bargaining agreement because, in that context, the union waives the rights of others, i.e., the rights of represented employees. *Wright*, 525 U.S. at 80-81. *Wright* cautioned that such a standard

Indeed, imposing a federal "knowing and voluntary" overlay on state contract law would make a mockery of this Court's instruction that "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc.*, 514 U.S. at 944.

Nor is this result inconsistent with the Seventh Amendment:

> [t]he Seventh Amendment confers not the right to a jury trial *per se*, but rather "only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes."

Cooper v. MRM Invs. Co., 367 F.3d 493, 506 (6th Cir. 2004) (citation omitted). In *Cooper*, the Sixth Circuit noted that, "[o]f the Circuits to squarely address the [Seventh Amendment] issue, all four share [this] view . . . ." *Id.* at 506 n.5 (citing *Melton v. Philip Morris Inc.*, 71 Fed. Appx. 701, 703 (9th Cir. 2003); *Am. Heritage*, 294 F.3d at 710-11; *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Koveleskie v. SBC Capital Markets*, 167 F.3d 361, 368 (7th Cir. 1999)); *see also* Pet. App. 18a (holding the same and collecting cases); *cf. EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 750 (9th Cir. 2003) (en banc) ("[W]e now join several other Circuits in concluding, pursuant to *Gilmer*, that the right to jury trial presents no bar to compulsory arbitration.").[5]

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does *not* apply to "an individual's waiver of his own rights" to a judicial forum, which is controlled by *Gilmer*. *Id.*

[5] Petitioners never identify the source of their purported federal "knowing and voluntary" standard. Clearly, such a heightened

2. No Circuit Has Squarely Adopted A Heightened "Knowing and Voluntary" Waiver Standard.

Seeking to manufacture a basis for granting certiorari, petitioners have gone to great lengths to contend that several other Circuits depart from this majority rule. That effort fails.

Petitioners are simply incorrect that the law of the Second, Tenth, and D.C. Circuits conflicts with the majority rule applied by the Eleventh Circuit in this case. The cases from the Second Circuit and the Tenth Circuit that petitioners cite do not address the validity of an arbitration agreement under the FAA at all, but rather consider the waiver of a right to a jury trial where the proceedings that replace it are in fact judicial (and, therefore, implicate the Seventh Amendment right), *see, e.g., National Equip. Rental, Ltd. v. Hendrix*, 565

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standard applicable only to arbitration agreements cannot emanate from the FAA. *See, e.g., Gilmer*, 500 U.S. at 32-33. And because they attempt to cast their heightened standard over claims arising under the ADEA, the FLSA, ERISA, and Title VII, the argument appears to preclude reliance on any particular statute other than the FAA. (If petitioners do purport to locate the heightened standard in another federal statute, they have failed to even identify such a statute, let alone probe its text, purpose, and legislative history to arrive at the heightened requirement. *See Gilmer*, 500 U.S. at 26.) Nor can petitioners derive their standard from the U.S. Constitution as no constitutional rights are even at issue. *See Wright*, 525 U.S. at 80-82 & n.2 (identifying right to judicial forum as a "statutory right"); *see also Cooper*, 367 F.3d at 506 (holding that the Seventh Amendment is inapplicable to agreements to arbitrate in lieu of litigation and collecting cases). Finally, to the extent petitioners rely on the standard applicable to waiver of *substantive* rights, this Court has already foreclosed the argument. *See Gilmer*, 500 U.S. at 26; *Mitsubishi*, 473 U.S. at 628.

F.2d 255 (2d Cir. 1997); *Hulsey v. West*, 966 F.2d 579 (10th Cir. 1992), *cited at* Pet. 15-16. These cases are thus irrelevant and certainly do not establish a circuit conflict.[6]

The same is true of petitioners' citation to the D.C. Circuit's decision in *Bailey v. Federal National Mortgage Ass'n*, 209 F.3d 740 (D.C. Cir. 2000), *cited at* Pet. 20-21. In *Bailey*, the D.C. Circuit adopted the "knowing and voluntary" standard as a matter of local District of Columbia law, not as a matter of general federal law. *See* 209 F.3d at 747 (refusing to compel arbitration "[i]n light of the undisputed facts in this case and the applicable law of the District of Columbia"). Thus, D.C. Circuit law is not even arguably in conflict either.

Nor is the Eleventh Circuit's decision in this case in conflict with the law of the Sixth and Ninth Circuits, the two Circuits to which petitioners devote substantial attention. The law of the Sixth Circuit is unsettled on the question whether a heightened federal "knowing and voluntary" waiver standard applies. There appears to be an intracircuit conflict as to whether such a rule should apply, and no decision has actually applied a heightened federal standard in an outcome-determinative manner. In *Walker v. Ryan's*

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[6] Indeed, relevant case law from the these Circuits is entirely consistent with the holding of the Eleventh Circuit here. *See Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 149 (2d Cir.) ("Whether one can be bound by an arbitration clause is usually determined by looking at generally accepted principles of contract law. Under such principles, in the absence of fraud or other wrongful act on the part of another contracting party, a party 'who signs or accepts a written contract . . . is conclusively presumed to know its contents and to assent to them . . . .'") (internal citations omitted; ellipsis in original), *cert. denied*, 543 U.S. 874 (2004); *Imhoff*, 203 F.3d at 764 (rejecting employees' argument for applying a heightened "clear and unmistakable" standard).

Family Steak Houses, Inc., 400 F.3d 370 (6th Cir.), *cert. denied*, 126 S. Ct. 730 (2005) – a case on which this Court recently denied certiorari notwithstanding that the petition for certiorari alleged the same purported circuit conflict petitioners allege here – a Sixth Circuit panel invoked the heightened knowing and voluntary standard, 400 F.3d at 381, although even in *Walker* the panel stated its conclusion in terms of state law, *see id.* at 376 ("we hold that the district [court] correctly refused to enforce Plaintiffs' arbitration agreements as unenforceable under Tennessee law"). In contrast, the panel in *Cooper v. MRM Investment Co.*, 367 F.3d 493 (6th Cir. 2004), disputed whether the law of the Sixth Circuit imposed a heightened federal waiver standard. *Id.* at 507-08. Moreover, the *Cooper* panel held that *even if* a knowing and voluntary waiver of jury trial rights were required, it would necessarily be met *whenever* a party entered an agreement to arbitrate, because "a party who enters an arbitration agreement necessarily consents to the clear and obvious consequence: the surrender of his right to go to trial." *Id.* at 508 (citing *Burden v. Check Into Cash Kentucky, LLC*, 267 F.3d 483, 492 (6th Cir. 2001)).

These two Sixth Circuit panels diverged in their interpretation of the Circuit's en banc decision in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (en banc). That decision provides tenuous support at best for the proposition that a heightened federal "knowing and voluntary" waiver standard applies as a matter of Sixth Circuit law. The discussion cited by petitioners (and by *Walker*) amounts to nothing more than a few sentences contained in a section of the opinion that expressly addresses "arguments that [the employee] raises with respect to the formation of the contract *under state law*." 317 F.3d at 666 (emphasis added); *id.* at 668 (applying "ordinary contract principles, remaining alert to ensure that employers do not defeat the policies of . . . Title VII by taking advantage of

their superior bargaining position or overreaching") (internal quotation marks omitted). That is why the panel in *Cooper* did not read *Morrison* as imposing a federal "knowing and voluntary" waiver standard. *See Cooper*, 367 F.3d at 507 (characterizing the Sixth Circuit's earlier "seeming endorsement of the knowing and voluntary standard [as] *dictum*" and noting the absence of en banc resolution of the issue).[7]

Moreover, the supposed "knowing and voluntary" waiver standard has *never* determined the outcome of a Sixth Circuit arbitration case. In *Walker*, the court's holding that the agreement to arbitrate was not enforceable expressly relied on independent grounds of Tennessee contract law, including that the employer "has not provided adequate consideration," 400 F.3d at 379, and that the arbitration agreement "did not result from a meeting of the minds in mutual assent," *id.* at 383. In *Morrison*, the court concluded that the agreement *was* enforceable (save its cost-splitting provisions, which were severed). *See Morrison*, 317 F.3d at 666. And *Cooper*, too, held that the arbitration agreement was enforceable, concluding that any knowing and voluntary standard would be inconsequential because "a party who enters an arbitration agreement necessarily consents to the clear and obvious

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[7] An examination of *Morrison* makes clear that the reference to a knowing and voluntary standard was in any event misguided. The case on which *Morrison* relied – *Adams v. Philip Morris, Inc.*, 67 F.3d 580 (6th Cir. 1995), *cited in Morrison*, 317 F.3d at 668 – applied the knowing and voluntary test to an agreement waiving *the substantive claims themselves*, not to an agreement that merely designated arbitration rather than litigation as the appropriate forum for resolving those claims. As this Court has repeatedly stated, "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

consequence: the surrender of his right to go to trial." *Cooper*, 367 F.3d at 508.[8] Thus, it is not clear that the "knowing and voluntary" standard is of any consequence even in the Sixth Circuit. Respondents have found no case (and petitioners do not cite one) in which the knowing and voluntary standard was dispositive in a Sixth Circuit refusal to enforce an arbitration agreement.

Because the Sixth Circuit does not have a settled rule requiring a heightened federal "knowing and voluntary" standard, the Eleventh Circuit's decision in this case cannot fairly be said to conflict with any rule of Sixth Circuit law. It would therefore be premature for this Court to grant certiorari now to consider the question – particularly given that the Eleventh Circuit's adoption of the majority rule rejecting such a standard is plainly the correct substantive outcome. If the Sixth Circuit ever settles the question definitively and applies a heightened federal standard to invalidate an arbitration agreement, the Court can consider the question at that point.

Moreover, the instant case would be an exceptionally poor vehicle for resolving any purported conflict with the Sixth Circuit. There is no case suggesting that the Sixth Circuit would have reached a different result on the facts presented here. Indeed, the Eleventh Circuit expressly suggested to the contrary, concluding that "the plaintiffs' acceptance of the DRP probably would satisfy even a heightened 'knowing and voluntary' standard in any event." Pet. App. 20a n.13 (citing *Cooper*, 367 F.3d at 506). That is because the DRP "expressly stated that the employee and Gulfstream both waived the right to a jury trial regarding

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[8] The Sixth Circuit in *Cooper* remanded for the district court to consider only "whether the likely costs of arbitration are so high that they will deter Cooper or similarly situated employees from exercising their right to arbitrate." 367 F.3d at 513.

covered claims and explained in detail the mandatory dispute resolution process." *Id.* Nothing more would be required even under the erroneous heightened standard petitioners urge. Thus, even if the Sixth Circuit had adopted a heightened "knowing and voluntary" standard, the Eleventh Circuit's decision in this case would not present a true conflict.

Petitioners' claim that Ninth Circuit law conflicts with the majority rule is even weaker. The cases petitioners invoke – most notably, *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994) – are no longer reflective of that Circuit's approach to determining the enforceability of arbitration agreements. In the 1990's, in two separate opinions, the Ninth Circuit held that, under the 1991 Civil Rights Act, waiver of rights to a judicial forum must be "knowing" (*Lai*) and "voluntary," *i.e.*, not compulsory (*Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998)). Both *Lai* and *Duffield* held that congressional intent to create a heightened standard for waiving rights to a judicial forum "is apparent from the text and legislative history of Title VII," a conclusion "reinforced" by the Civil Rights Act of 1991. *Lai*, 42 F.3d at 1304; *see also Duffield*, 144 F.3d at 1189-90. *Duffield* expressly followed *Lai* in construing the purpose of the 1991 Act as "uniformly to *expand* employees' rights and 'to *increase* the possible remedies available to civil rights plaintiffs.'" *Duffield*, 144 F.3d at 1192 (quoting *Lai*, 42 F.3d at 1304) (emphasis in original). And both *Lai* and *Duffield* reflected a hostility to – or, at minimum, a skepticism of – arbitration and the adequacy of the arbitral forum. *See, e.g., Lai*, 42 F.3d at 1305 ("the remedies and procedural protections available in the arbitral forum can differ significantly from those contemplated by the legislature [that enacted the 1991 Act]").

The Ninth Circuit has since revisited *Duffield* en banc, *see EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc), and expressly overruled the decision on the ground that "[t]he presumption in *Duffield* . . . that allowing compulsory arbitration weakens the 1991 Act is inconsistent with the Supreme Court's endorsement of arbitration." *Luce, Forward*, 345 F.3d at 750; *see also id.* ("[T]he view that compulsory arbitration weakens Title VII conflicts with the Supreme Court's stated position that arbitration affects only the choice of forum, not substantive rights."). Although *Luce, Forward* did not also explicitly reverse *Lai*, the logic of *Luce, Forward* destroys *Lai*'s foundation, and, indeed, no published opinion has applied *Lai*'s knowing standard since. *See, e.g., Ingle v. Circuit City*, 408 F.3d 592, 595 (9th Cir. 2005) (applying ordinary principles of contract law).

Thus, there is no reason to think that the Ninth Circuit would apply even a heightened "knowledge" standard in the future, much less the "knowing and voluntary" waiver standard petitioners urge. Consequently, there is no reason for this Court to grant certiorari now to consider the question. If the Ninth Circuit continues to adhere to *Lai*'s heightened knowledge requirement in a case in which that requirement determines the outcome, this Court can grant certiorari at that point.

In any event, as with the Sixth Circuit's "knowing and voluntary" standard, application of *Lai*'s "knowing" waiver standard would not produce a different result here. *See* Pet. App. at 20a n.13. Contrary to petitioners' assertion that such a standard would require *actual* knowledge, *see* Pet. at 11, the pre-*Luce* Ninth Circuit case law made clear that "knowing" agreement merely required that the employee be given the necessary information – *i.e.*, that she was entering a binding agreement to arbitrate employment-related claims.

Meeting that standard did *not* require actual knowledge. *See, e.g., Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1156 (9th Cir. 1998); *cf. Lai*, 42 F.3d at 1305 (holding that there was no "knowing" waiver when employees "could not have understood that in signing [the form], they were agreeing to arbitrate sexual discrimination suits"). Here, the district court found (and petitioners do not dispute) that the DRP and its accompanying materials made manifest that, by continuing their employment, petitioners agreed to bring certain employment claims solely in the arbitral forum, and that they waived the right to any other forum, including the right to a jury trial. *See* Pet. App. 40a, 50a. Because any waiver in the present case would be deemed "knowing" under the standard in *Lai*, this case would not present a true conflict even if the Ninth Circuit continued to adhere to *Lai*.

B. This Case Does Not Present Any Question Regarding The Applicability Of The First Circuit's Standard Articulated In *Rosenberg*.

Nor is there any basis for petitioners' contention that certiorari should be granted to resolve a purported inconsistency between the Eleventh Circuit's decision in this case and the so-called "appropriateness" test created by the First Circuit, which purports to rely on language in the 1991 Civil Rights Act to limit enforcement of arbitration agreements when it would not be "appropriate" to arbitrate. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999), *cited at* Pet. 17. To the contrary, petitioners' invocation of *Rosenberg* is a red herring.[9]

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[9] *Rosenberg* grounded its holding solely on the 1991 Civil Rights Act, which states that "where appropriate and to the extent authorized by law . . . arbitration . . . is encouraged to resolve disputes arising under [these laws]." Civil Rights Act of 1991,

First, as petitioners themselves concede, *Rosenberg* provides no support at all for the standard petitioners advance. In *Rosenberg*, the First Circuit expressly *declined* to resolve the question whether a heightened knowing and voluntary standard applies to agreements to arbitrate. *See* 170 F.3d at 18. Thus, there is no conflict with the Eleventh Circuit on the question presented in the petition.

Second, *Rosenberg* deals with an issue – notice – that is not implicated by the facts of this case. *See id.* at 21 (holding that the 1991 Civil Rights Act requires "some minimal level of notice to the employee that statutory claims are subject to arbitration"); *see also Campbell v. General Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005). The *Rosenberg* court determined that compelling arbitration would be inappropriate under the circumstances of that case, because the agreement had failed to provide the employee with notice that her statutory claims would be subject to arbitration. *See* 170 F.3d at 17-18. *Rosenberg* expressly distinguished the facts before it from circumstances such as those present here, stating:

> If Merrill Lynch had provided the rules to Rosenberg but she did not read them, that would not save her. . . . *This opinion also does not suggest utilization of a subjective standard which focuses on what the employee actually knew.* . . . Indeed, it would be an odd result if the 1991 [Act] were to be interpreted based on the assumption that women and minorities, otherwise competent to enter contracts, were somehow disabled and in need of such special

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Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081. The decision carefully distinguishes the appropriateness requirement that it finds in the 1991 Act from any generally applicable concerns under the FAA or common law. *See* 170 F.3d at 19 ("appropriateness" was not a concern that emanated from the FAA or common law).

> protections where the subject of the contract was an agreement to arbitrate.

Id. at 21 n.17 (emphasis added).

Thus, the Eleventh Circuit properly concluded that, even if the "appropriateness" test were somehow relevant to the instant inquiry – and it is not – that would not change the outcome of this case. *See* Pet. App. 26a-27a n.18 (distinguishing the First Circuit cases and emphasizing that "Gulfstream's DRP did provide extensive details regarding its arbitration policy"); *see also* Pet. App. at 45a-48a (district court decision) (discussing evidence demonstrating that petitioners had notice of the DRP).[10]

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[10] As the Eleventh Circuit correctly recognized, nothing in its opinion conflicts with the First Circuit's decision in *Campbell*, in which the First Circuit determined that, under the particular circumstances before it, the mass e-mail sent by a General Dynamics subsidiary heralding its newly adopted arbitration policy was insufficient to provide a "reasonably prudent employee notice of the waiver," where, among other things, the text of the e-mail "undersold the significance of the Policy and omitted the critical fact that it contained a mandatory arbitration agreement." 407 F.3d at 555, 558.

In sharp contrast, the district court in this case expressly found that "Plaintiffs had notice of the mandatory arbitration provision of the DRP such that their continued employment served as acceptance thereof." Pet. App. 45a. Notably, respondents here did not rely simply on a mass e-mail, but instead (as the district court expressly noted) mailed hard copies of the DRP and its explanatory documents to each plaintiff's address, posted notices on bulletin boards throughout the Gulfstream facility, and posted the DRP and accompanying documents on the company intranet. *See id.* at 46a-49a.

C. The Remaining Circuit Conflicts That Petitioners Allege Are Not Presented In This Case.

In a final desperate attempt to buttress their argument for certiorari, petitioners go on at length about alleged circuit splits pertaining to two additional questions – whether state law may impose a "knowing and voluntary" waiver standard, and whether the plaintiff or defendant bears the burden of proof when such a standard is imposed, *see* Pet. at 22-28. Neither of these alleged conflicts is even remotely presented by this case. Thus, petitioners' invocation of this case law is entirely beside the point.

Petitioners do not contend that Georgia law imposes a "knowing and voluntary" waiver standard. (Precisely for this reason, petitioners purport to find such a standard *under federal law*.) And, because the Eleventh Circuit correctly concluded that neither federal nor Georgia law holds an agreement to resolve claims in an arbitral rather than judicial forum to any such heightened standard, the court had no occasion to consider which party would bear the burden of proof if such a standard were to apply.

Indeed, what appears to be driving the petition for certiorari is dissatisfaction with Georgia contract law as correctly applied by the Eleventh Circuit. Petitioners decry the differences between Georgia and California contract law. *See* Pet. 18-20 n.29. There is no reason to think, however, that the agreement at issue here would be invalid under California law. And regardless, by placing arbitration agreements on equal footing with other contracts and providing that such agreements are governed by state law, the FAA clearly contemplates that an arbitration agreement enforceable in one State may not be enforceable in another. *See, e.g.*, *Gilmer*, 500 U.S. at 32-33. It therefore would make no difference if an arbitration agreement formed in one State (and governed by that State's law) would not be enforceable,

while the same agreement formed in another State (and governed by that State's law) would be deemed valid. This is to be expected in a federal system.

There is no dispute here, moreover, that *Georgia* contract law recognizes as valid and binding petitioners' acceptance of the DRP at issue in this case. Finding no support in the relevant state law, petitioners request this Court to displace Georgia contract law by creating a heightened federal standard that has no justification in the text of the FAA or precedent interpreting it.

Thus, the only justification for a heightened standard – and the one that animates the petition here – is precisely the hostility to arbitration and suspicion of the arbitral forum that Congress intended to eliminate through adoption of the FAA and that this Court has repeatedly condemned. *See, e.g., Gilmer*, 500 U.S. at 24-25; *Circuit City Stores*, 532 U.S. at 111; *Shearson/American Express*, 482 U.S. at 226.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

LEE CALEY, *et al.*,

Petitioners,

v.

GULFSTREAM AEROSPACE CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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TABLE OF CONTENTS

		Page
I.	THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTION PRESENTED	1
II.	THERE IS A CONFLICT AMONG THE COURTS OF APPEALS AS TO WHETHER WAIVERS OF PROCEDURAL RIGHTS UNDER FEDERAL EMPLOYMENT STATUTES MUST BE KNOWING AND VOLUNTARY	2
III.	CERTIORARI SHOULD BE GRANTED TO RESOLVE THE DIFFERENCES AMONG STATE COURTS AS TO WHETHER WAIVERS OF PROCEDURAL RIGHTS UNDER FEDERAL EMPLOYMENT STATUTES MUST BE KNOWING AND VOLUNTARY	7
IV.	THE QUESTION PRESENTED IS SUBSTANTIAL	8
CONCLUSION		10

TABLE OF AUTHORITIES

Page

CASES:

Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204 (2006) 7

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) 8

Circuit City Stores, Inc. v. Mantor, 417 F.3d 1060 (9th Cir. 2005) 5

Cooper v. MRM Investment Co., 367 F.3d 493 (6th Cir. 2004) 3, 4

Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998) 4, 5

EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) 4, 5

Felder v. Casey, 487 U.S. 131 (1988) 8

Gaines v. Mr. Formal, Inc., 2004 WL 1722033 (D.Or.) 5

Gonzalez v. Rent-A-Center, 2005 WL 1353883 (N.D.Ohio) 3

Hardin v. Morningside of Jackson, L.L.C., 2006 WL 768411 (W.D.Tenn.) 3

Ingle v. Circuit City, 408 F.3d 592 (9th Cir. 2005) 5

Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003) 3

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 8

Prudential Insurance Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994) 4, 5

Ramirez-De-Arellano v. American Airlines, Inc., 133 F.3d 89 (1st Cir. 1997) 6

TABLE OF AUTHORITIES – Continued

Page

Rosenberg v. Merrill Lynch, Pierce, Fedder, & Smith, Inc., 170 F.3d 1 (1st Cir. 1999) 5, 6, 9

Siordia v. Circuit City Stores, Inc., 2005 WL 1368083 (9th Cir.) 5

Taylor v. Ash Grove Cement Co., 2004 WL 1382726 (D.Or.) 5

Walker v. Ryan's Family Steak Houses, Inc., 126 S. Ct. 730 (2005) 4

Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370 (6th Cir. 2005) 3

Wright v. Universal Maritime Service, Inc., 525 U.S. 70 (1998) 9

STATUTES:

9 U.S.C. § 2 7

29 U.S.C. § 626(c)(2) 7

42 U.S.C. § 1981a(c) 7

OTHER AUTHORITIES:

Age Discrimination in Employment Act 7, 8, 9

Restatement (Second) of Contract, § 23 cmt. c (1981) 2

Title VII 7, 8, 9

Fair Labor Standards Act 8, 9

Employee Retirement Income Security Act 8, 9

I. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTION PRESENTED

The Question Presented – whether waivers of procedural rights under federal employment laws must be knowing and voluntary – is squarely posed by this case. That question was expressly decided both by the district court (Pet. App. 43 n.6, 50) and by the court of appeals (Pet. App. 17-20, 21 n.14). The relevant facts are not in dispute.

If such waivers must be voluntary, the decision of the court of appeals would necessarily have to be reversed. The express purpose and undisputed effect of Gulfstream's actions was to compel its employees to give up their procedural rights under federal law in order to avoid forfeiting their jobs. The district court correctly described the loss of those rights as having been "required" by Gulfstream. (Pet. App. 52). Short of measures that would ordinarily constitute serious crimes, it would be difficult to construct a scheme more coercive than that utilized by Gulfstream in this case.

If such waivers must be knowing, the decision of the court of appeals also must be reserved. The issue is not, as respondents at times suggest, whether a person who knows that a claim is to go to arbitration would realize that meant there would be no court trial or jury.[1] The dispute here concerns the interpretation of Georgia law accepted by the courts below, under which only two events were required to *create* an arbitration contract that stripped workers of most of their procedural rights under federal employment law: receipt of an envelope containing

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[1] Respondents repeatedly refer to a footnote in the court of appeals' decision suggesting that the "knowing and voluntary" requirement was satisfied. (R.Br. 8, 18-19, 20). The passage referred to, however, concerns whether an employee who read the DRP, understood that it was an offer to contract, and decided to accept that offer, would have realized that he or she was giving up the right to a jury trial. App. 20 n.13.

the DRP, and going to work on August 1, 2002. Gulfstream was not required to prove, and made no effort to demonstrate, that each (or any) of the employees actually opened the envelope, read the contents, found buried among its 5500 words the single passage on which the company relies, or understood that under Georgia law that passage meant that the DRP was not, as its title stated, a "Corporate Policy," but instead constituted an "offer," a term never used in the DRP at all.[2]

The ordinary rule of contract law is that an offeree's actions do not create a contract unless the offeree had actual knowledge both that an offer had been made and that those actions would constitute agreement to that offer. Restatement (Second) of Contract, § 23 cmt. c (1981). Gulfstream prevailed in the court of appeals precisely because it persuaded the Eleventh Circuit that under Georgia contract law there is no such knowledge requirement, an interpretation of state law which we do not in this Court dispute. It was for precisely that reason that the court of appeals emphatically refused to permit the employee-specific inquiry that would be necessary to determine whether any employee understood that an offer to contract had been made or that offer merely by going to work in August, 2002. (Pet. App. 16-17 n.12).

II. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS AS TO WHETHER WAIVERS OF PROCEDURAL RIGHTS UNDER FEDERAL EMPLOYMENT STATUTES MUST BE KNOWING AND VOLUNTARY

Respondents acknowledge that the Sixth Circuit has repeatedly adopted a "knowing and voluntary" requirement,

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[2] Gulfstream has never claimed that its employees could have known, when the modified DRP was put into effect on April 10, 2003, that hundreds of them were to be permanently laid off the very next day; those impending layoffs were a closely guarded secret.

both in its en banc decision in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir 2003) (en banc), and in invalidating the arbitration agreement in *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005). (R.Br. 16-17; R.Br. 17 n.7 (objecting that the en banc decision in *Morrison* was "misguided")). Respondent argues, however, that within the Sixth Circuit there actually is an intra-circuit split, relying on *Cooper v. MRM Investment Co.*, 367 F.3d 493 (6th Cir. 2004).

Far from rejecting the Sixth Circuit's knowing and voluntary rule, *Cooper* actually applied that very standard.[3] Respondents contend that *Cooper* disagreed with *Walker's* (subsequent) interpretation of *Morrison*. (R.Br. 16). But *Cooper* does not even purport to interpret *Morrison*; *Cooper* never refers to the decision in *Morrison* at all. District courts in the Sixth Circuit today apply *Morrison* and the most recent decision in *Walker* as binding circuit precedent.[4]

Respondents argue that *Cooper* held that

> even if a knowing and voluntary waiver of jury trial rights were required, it would necessarily be met *whenever* a party entered an agreement to arbitrate, because "a party who enters an arbitration agreement necessarily consents to the clear and obvious consequence: the surrender of his right to go to trial." [367 F.3d] at 508.

(R.Br. 16) (emphasis in original). But the issue in the instant case is not (as in *Cooper*) whether the existence of a knowing waiver of the right to trial can be established by showing that a worker knowingly agreed to binding

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[3] 367 F.3d at 508 (agreement valid "even if . . . a contractual waiver of the right to a jury trial must be 'knowing and voluntary' "), 508 ("As to the 'clear' or 'knowing and voluntary' character of the waiver of a judicial forum, the MRM agreement is short, clear and embodied in a separate document, not buried in a lengthy handbook.")

[4] *E.g., Hardin v. Morningside of Jackson, L.L.C.*, 2006 WL 768411 *7 (W.D.Tenn.); *Gonzalez v. Rent-A-Center*, 2005 WL 1353883 *3-*4 (N.D.Ohio).

arbitration. The threshold question here is whether the employer must show that the employee actually knew that he or she was entering into an agreement at all. In *Cooper* that knowledge was undisputed; the arbitration agreement in *Cooper* expressly and repeatedly used the words "I agree," and the employee had affirmatively signed the document in question. 367 F.3d at 497. Thus *Cooper* rested on precisely the circumstance that is missing here – actual knowledge by the employee that he or she was making an agreement.

Respondents suggest that this Court should deny certiorari in the instant case because the Court denied review in *Walker v. Ryan's Family Steak Houses, Inc.*, 126 S. Ct. 730 (2005). The respondent in *Walker*, in opposing certiorari, insisted that no courts of appeals had ever rejected the "knowing and voluntary" standard.[5] The respondents in the instant cases take precisely the opposite position, contending that no court of appeals actually utilizes that standard. At least one of these responses must be mistaken. (In fact both are). *Walker* was not an appropriate vehicle for resolving this issue, because that decision also rested on one or more alternative grounds.[6]

Respondents acknowledge that the Ninth Circuit in *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), adopted a requirement that any waiver must be knowing. (R.Br. 19). Respondents argue that *Lai* is no longer controlling precedent in the Ninth Circuit because of the 2003 decision in *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc). (R.Br. 19-20). The issue in *Luce, Forward*, however, was only whether a waiver must be voluntary, not whether it must be knowing. Although *Luce, Forward* overruled the decision in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), that waivers must be voluntary, *Luce, Forward* expressed no criticism of the requirement in *Lai*

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[5] Respondent's Brief in Opposition, No. 04-1672, pp. 5-6.

[6] Respondent's Brief in Opposition, No. 04-1672, pp. 6-15.

that waivers must be knowing. 345 F.3d at 749 n.6 (summarizing *Lai*). Since 2003 the Ninth Circuit has repeatedly refused to extend *Luce, Forward*, emphasizing that its holding was "narrow" and dealt solely with the issue of voluntariness.[7] District courts continue to treat *Lai* as stating the controlling Ninth Circuit standard regarding knowledge.[8]

Respondents acknowledge that the First Circuit holds that waivers of procedural rights under federal employment laws must meet certain minimum *federal* standards (R.Br. 21-23), a holding emphatically rejected by the Eleventh Circuit, which insists that states may set whatever standards they please. Respondents argue, however, that they would prevail even under the First Circuit standard, relying on *Rosenberg v. Merrill Lynch, Pierce, Fedder, & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999). (R.Br. 21-22). In *Rosenberg* there was no question that the employee had knowingly entered into an arbitration agreement; she had signed a form which began "I agree to arbitrate any dispute . . . that may arise between me and my firm. . . . " 170 F.3d at 4. The issue in *Rosenberg* was whether that agreement encompassed employment discrimination claims. The First Circuit held that (regardless of state contract law) federal law sets a minimum standard of clarity for agreements waiving the right to sue in federal

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[7] *Ingle v. Circuit City*, 408 F.3d 592, 595 (9th Cir. 2005) ("Our decision in *Luce Forward* was narrow. We considered only whether the Civil Rights Act of 1991 precluded employers from requiring employees . . . to waive their right to bring future Title VII cases in federal court."), 595 ("*Luce Forward* was a narrowly written decision overruling *Duffield*"); *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1064 (9th Cir. 2005) (refusing to extend *Luce, Forward*); *Siordia v. Circuit City Stores, Inc.*, 2005 WL 1368083 *1 (9th Cir.) (refusing to extend *Luce, Forward*).

[8] *E.g., Taylor v. Ash Grove Cement Co.*, 2004 WL 1382726 *4 (D.Or.); *Gaines v. Mr. Formal, Inc.*, 2004 WL 1722033 *1 (D.Or.).

court, and that the materials in *Rosenberg* failed to meet that standard.[9]

Respondents argue that the circumstances of this case would be sufficient in the First Circuit because *Rosenberg* required only efforts to provide notice to, not actual knowledge by, an employee, and argue that they provided such notice. (R.Br. 22-23). But the *Rosenberg* notice requirement governs cases in which there was undeniably an agreement, and where the dispute is only about which claims were within the scope of that agreement. A different standard applies in the First Circuit where, as here, the dispute concerns whether there was an agreement at all. In a case such as this the First Circuit requires the employer to show that "the agreement to arbitrate was, indeed, . . . *intentional*." *Ramirez-De-Arellano v. American Airlines, Inc.*, 133 F.3d 89, 91 (1st Cir. 1997) (emphasis added). Respondents have never argued, and the courts below never held, that any of Gulfstream's employees *intended* by the mere act of going to work on August 1, 2002, to make some sort of agreement.[10]

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[9] 170 F.3d at 20 ("The question then becomes which party should bear the risk of [the employee's] ignorance. Given Congress's concern that agreements to arbitrate employment discrimination claims should be enforced only where 'appropriate,' . . . Merrill Lynch should . . . bear that risk.")

[10] Respondents rely on a statement in the court of appeals decision that "Gulfstream's DRP did provide extensive details regarding *its* arbitration *policy*." (R.Br. 23, *quoting* Pet. App. 26a-27a n.18) (emphasis added). That might satisfy the notice requirement of *Rosenberg* if the issue here were *which* disputes were covered by an agreement whose existence was not in question.

But the issue here is whether there was an agreement at all. The quoted passage has no bearing on whether, as required by *Ramirez-De-Arellano*, the employees had intentionally entered into an agreement. To the contrary, that passage refers to the details of a "policy" (not an agreement) and uses the possessive pronoun "its" (referring to the policy of Gulfstream) not "their" (which would be appropriate for any agreement made by the employees).

Respondents acknowledge that decisions in the Second and Tenth Circuits hold as a matter of federal law that the right to have federal employment claims decided by a jury – a right expressly included in the text of Title VII[11] and the ADEA[12] – can be waived only through a knowing and voluntary act. (R.Br. 14). Respondents contend that these cases are distinguishable because in the instant case the language stripping Gulfstream employees of that right was contained, not in an ordinary contract, but in an arbitration agreement. (R.Br. 14). But such a distinction is simply inconsistent with the text of the FAA and with the decisions of this Court, both of which make clear that under the FAA the validity of a purported arbitration agreement is to be governed by the *same* standard that would apply to other contracts. 9 U.S.C. § 2; *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209 (2006) ("arbitration agreements [are to] be treated like all other contracts.")

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE DIFFERENCES AMONG STATE COURTS AS TO WHETHER WAIVERS OF PROCEDURAL RIGHTS UNDER FEDERAL EMPLOYMENT STATUTES MUST BE KNOWING AND VOLUNTARY

Respondents do not dispute our description of the law in eight states which – unlike Georgia – hold that a waiver of the sort involved in the instant case cannot be enforced if it was not knowing and voluntary. Respondents argue only that it is entirely appropriate that the validity of such a waiver would vary from state to state. (R.Br. 24-25).

Ordinary contract claims properly depend upon, and vary with, state contract law. But the Question Presented

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[11] 42 U.S.C. § 1981a(c).

[12] 29 U.S.C. § 626(c)(2).

concerns the validity of waivers of rights expressly conferred by federal employment statutes, here Title VII, ERISA, the Age Discrimination in Employment Act, and the Fair Labor Standards Act. Today a federal judge in California, New Jersey, Washington, Missouri, Connecticut, West Virginia, Montana, or Utah would refuse to enforce a waiver of those rights that was not knowing and voluntary, and would proceed to decide on the merits a plaintiff's federal employment claims. But a federal judge presented with the identical circumstances in Georgia would be required by the decision below to dismiss the same federal lawsuit.

This Court has on repeated occasions recognized the importance of a uniform national application of federal civil rights laws. *E.g.*, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754 (1998); *Felder v. Casey*, 487 U.S. 131, 148 (1988); *Patterson v. McLean Credit Union*, 491 U.S. 164, 182-83 (1989). If the Eleventh Circuit was correct when it held there are no minimum federal standards governing waivers of federal procedural rights, then the degree to which workers asserting federal employment claims are protected from coercive or deceptive waivers will vary from state to state. But whether the Eleventh Circuit was correct is of course the very Question Presented. The significance of the undisputed differences in state law standards is inextricably intertwined with the merits of this case.

IV. THE QUESTION PRESENTED IS SUBSTANTIAL

The Question Presented concerns whether federal law imposes limitations on the validity of arrangements (whether involving arbitration or not) that strip employees of their procedural rights under federal employment laws, most fundamentally the right to enforce those laws in federal court. The Eleventh Circuit held that federal plaintiffs must look solely to state law for protection against coercive or manipulative schemes.